Editor's Note: Reconsideration denied by Order dated Sept. 27, 2000); appeal filed, Civ. No. 00-2785-LC (W.D. LA); reversed and remanded, (Nov. 1, 2002).

MURPHY EXPLORATION AND PRODUCTION CO.
MOBIL EXPLORATION AND PRODUCING U.S. INC.

IBLA 95-442, 95-508, 97-33, 98-224, 98-225, 98-226 — Decided March 5, 1999

Consolidated appeals from decisions of the Associate Director, Minerals Management Service, affirming the denial of requests for transportation allowance and assessing additional royalties for improper transportation deductions for gas produced on leases maintained under section 6 of the Outer Continental Shelf Lands Act. MMS-93-0476-OCS, MMS-93-0993-OCS, MMS-95-0106-O&G, MMS-95-0220-OCS, MMS-95-0462-OCS, MMS-92-0493-OCS.

Affirmed.

1. Oil and Gas Leases: Royalties: Generally--Outer Continental Shelf Lands Act: State Leases: Generally

   The holder of oil and gas leases issued on state lease forms for lands on the Outer Continental Shelf by the State of Louisiana and maintained under sec. 6 of the Outer Continental Shelf Lands Act must pay royalties in accordance with the provisions of the original State leases. Where the leases were issued on the 1942 Louisiana State lease form, which provides that the lessee shall pay to the lessor sums free of expense, equal to the value at the well of one-eighth of all gas produced and saved or utilized, and further provides that no gathering or other charges shall be chargeable to lessor, the lessee is not permitted to deduct transportation allowances from the amount on which royalty is calculated.

APPEARANCES: George J. Domas, Esq., and Jonathan A. Hunter, Esq., New Orleans, Louisiana, for Murphy Exploration & Production Company; Deborah Bahn Haglund, Esq., Dallas, Texas, for Mobil Exploration & Producing U.S. Inc.; Peter J. Schaumberg, Esq., Howard W. Chalker, Esq., and Geoffrey Heath, Esq., Office of the Solicitor, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE PRICE

These are appeals 1/ from decisions of the Associate Director and Acting Associate Director for Policy and Management Improvement, Minerals Management Service (MMS). 2/ Murphy Exploration and Production Company (Murphy) appeals from a Decision dated February 3, 1995 (MMS-93-0476-OCS), and assigned docket number IBLA 95-442. Mobil Exploration and Producing U.S. Inc. (Mobil) appeals five decisions. These are a February 28, 1995, Decision (MMS-93-0993-OCS), docketed as IBLA 95-508; three Decisions of the Acting Associate Director dated May 9, 1996, docketed as IBLA 97-33 (MMS-95-0106-O&G), IBLA 98-224 (MMS-95-0220-OCS), and IBLA 98-225 (MMS-95-0462-OCS); and the Decision of the Associate Director dated May 23, 1996 (MMS-92-0493-OCS), docketed as IBLA 98-226. All of these appeals involve orders denying requests for transportation allowances for certain leases validated under section 6 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1335 (1994), and assessing additional royalties. Before this Board, Murphy filed a Supplemental Statement of Reasons (SSOR), which Mobil adopted as its own in IBLA 95-508 (MMS-93-0993-OCS). Mobil also requested consolidation of IBLA 95-442 and IBLA 95-508, and by Order dated September 12, 1995, the request was granted. 3/ Because the issues raised in IBLA 97-33, IBLA 98-224, IBLA 98-225, and IBLA 98-226 are the same as those stated in IBLA 95-442 and IBLA 95-508, Mobil moved for consolidation of all the appeals on July 18, 1996. 4/ That request is granted.

1/ Four of Mobil's five appeals originally were docketed together and assigned docket number IBLA 97-33. Three of those appeals were later re-docketed separately and assigned docket numbers IBLA 98-224, 98-225, and 98-226.

2/ For convenience, we will not distinguish between the Acting Associate Director and the Associate Director.

3/ The same order suspended consideration of those appeals pending a decision by the Court of Appeals for the Fifth Circuit in OXY USA Inc. v. Babbitt, No. 95-31047. That court issued its decision on Sept. 8, 1997, 122 F.3d 251, vacating the district court's decision in OXY USA, Inc. v. Babbitt, Civil Action No. 93-1186-LC (W.D. La.), and remanding the case for entry of judgment dismissing Count III of the complaint with prejudice. Counts I and II had been settled by the parties. (Appellants' Status Report to IBLA filed Nov. 10, 1997, at 2.) The district court had issued an interlocutory ruling on Dec. 1, 1994, denying OXY's motion for partial summary judgment and granting the Government's motion for summary judgment (Ruling). In its motion, OXY sought a declaratory ruling that the Department's conclusion that transportation costs are not permitted under the 1942 lease form is arbitrary and capricious and not otherwise in accordance with law (Count III in the complaint). We further note that Murphy incorporated the allegations in OXY's complaint in its SSOR filed with the Board. Accordingly, the matter is now ripe for decision.

4/ MMS purported to approve Mobil's request to consolidate the appeals in IBLA 97-33, IBLA 98-224, and IBLA 98-225 with IBLA 95-508. This it could not do, since this Board had assumed jurisdiction over IBLA 95-508. (Attachment 2 to Appellants' Status Report filed Nov. 10, 1997, at 2, n.1.)

The Associate Director's Decision in IBLA 95-442 (MMS-93-0476-OCS) denied Murphy's appeal of a September 8, 1993, decision by the MMS Royalty Management Program (RMP) assessing additional royalties of $5,954.84 for improperly deducting transportation costs from the royalty value of gas sold from 11 section 6 leases during the months of February and March 1992. The RMP also directed Murphy in the future to value production for royalty purposes without deducting transportation costs.

The February 28, 1995, Decision in IBLA 95-508 (MMS-93-0993-OCS) upheld a January 22, 1993, denial by the RMP's Valuation and Standards Division of Mobil's request for transportation allowances for a number of leases, including 10 section 6 leases. (Enclosure 3 to RMP's January 22, 1993, denial.) The remaining three MMS Decisions appealed by Mobil similarly upheld orders disallowing a transportation deduction for natural gas from section 6 leases. More specifically, the May 9, 1996, MMS decision in IBLA 97-33 (MMS-95-0106-O&G) upheld a January 12, 1995, MMS order disallowing $197,048.48 in transportation deductions for natural gas (bill for collection ABIL 01530054). 5/

The second of the Associate Director's May 9, 1996, Decisions appears in IBLA 98-224 (MMS-95-0220-OCS), and it affirmed an order of the Financial Compliance Branch dated February 27, 1995, which assessed Mobil $7,904.54 (ABIL 02530056) in additional royalties attributable to deductions Mobil had taken for the costs of transporting gas produced on a section 6 lease. 6/

The third May 9, 1996, Decision issued by the Associate Director (MMS-95-0462-OCS) was docketed as IBLA 98-225. It affirmed an RMP bill of collection dated June 6, 1995, assessing Mobil $4,852.46 (ABIL 05530016) in

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5/ The MMS order of Jan. 12, 1995, concerned two bills for collection, ABIL 01530053 and ABIL 01530054. However, a Sept. 19, 1995, memorandum from the Chief, Financial Compliance Branch, MMS, to the Chief, Appeals Division, MMS, stated that ABIL 01530053 had been resolved when Mobil submitted a corrected Form MMS-2014. Therefore, that order and the corresponding appeal to the Associate Director were closed. In regard to ABIL 01530054, the Sept. 19, 1995, memorandum stated that Mobil had submitted a corrected Form MMS-2014 for parts of the ABIL and would be submitting another corrected Form for other lines in the ABIL. The only part of the Jan. 12, 1995, order thus left in dispute involves lines 235-470 and 472-481 relating to gas transportation allowances of $197,048.48 for 1990 on section 6 leases, and accordingly, the Associate Director's Decision dealt only with the propriety of those allowances.

6/ The Feb. 27, 1995, order involved two bills, ABIL 02530055 and 02530056, but all issues in ABIL 02530055 were resolved prior to the Associate Director's Decision. Mobil and MMS also resolved all of the issues in ABIL 02530056, except those related to gas transportation allowances on section 6 leases in lines 93 to 119, for the period January through May 1991. Thus, the only issue before the Associate Director was that of the permissibility of deductions for transportation costs for section 6 leases.

additional royalties because of deductions Mobil had taken for the costs of transporting gas produced on certain section 6 leases for November 1994.

The May 23, 1996, Decision in IBLA 98-226 (MMS-92-0493-OCS) affirmed a September 29, 1992, order issued by the RMP directing Mobil to pay $91,633.75 in additional royalties for gas. 7/

All of the leases involved in these appeals were issued by the State of Louisiana (State) on its 1942 lease form prior to enactment of the OCSLA on August 7, 1953. With the enactment of the OCSLA, Congress provided that the OCS lands were subject only to Federal leasing. In addition, however, existing state leases issued by the State prior to August 7, 1953, were to be maintained as Federal leases pursuant to section 6 of the OCSLA, 43 U.S.C. § 1335 (1994), and hence these are referred to as section 6 leases. See generally Sonat Exploration Co., 105 IBLA 97, 99 (1988). Section 6(b) of the OCSLA provides that the original royalty provisions of state-issued leases validated under section 6(a) continue to govern. 43 U.S.C. § 1335(b) (1994). The regulations implementing section 6 provide, in relevant part, that the royalty provisions of leases maintained under section 6 "shall continue in effect, and, in the event of any conflict or inconsistency, shall take precedence over these regulations." 30 C.F.R. § 256.79.

The MMS Decisions here at issue held that the 1942 lease provisions expressly prohibit the deduction of costs associated with the transportation of oil or gas to the purchaser for purposes of computing the royalties due under a section 6 lease. 8/ The Decisions found further support in language in the 1942 lease form that provides that "no gathering or other charges are made chargeable to lessor" in calculating royalties due on natural gas. In reaching these conclusions the Associate Director relied on this Board's decision in Exxon Company, U.S.A., 118 IBLA 30 (1991), and its Order in OXY USA Inc., IBLA 89-14 (Oct. 19, 1992), affirming MMS' interpretation of the 1942 lease, as well as a Federal district court ruling that the Board's Order in OXY USA Inc., supra, was rationally supported. OXY USA, Inc. v. Babbitt, CA. No. 93-1186-LC (W.D. La., Dec. 1,

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7/ The Sept. 29, 1992, order originally concerned larger amounts, but parts of the bill were resolved pursuant to a global Compromise and Settlement Agreement dated Sept. 25, 1995, between MMS and Mobil Oil Corporation and various subsidiaries. The only issue remaining from the Sept. 29, 1992, order to be decided by the Associate Director was the direction to pay $91,633.75 for improper deductions of gas transportation costs for section 6 leases. (May 23, 1996, Decision at 2.)

8/ Section 8 of the OCSLA, 43 U.S.C. § 1337 (1994), authorizes the Secretary to issue mineral leases for any submerged lands of the Outer Continental Shelf not covered by leases meeting the requirements of section 6. The Feb. 3, 1995, Decision at issue in IBLA 95-442 correctly acknowledged that section 8 leases are entitled to transportation cost allowances pursuant to Departmental regulations.

1994). 9/ The issue on appeal therefore is whether MMS correctly decided that the terms of the 1942 Louisiana State lease form preclude gas transportation deductions from royalty basis.

The following terms from the 1942 Louisiana lease form 10/ govern payment of royalties and are at the center of this dispute:

> Should * * * gas * * * be produced in paying quantities on the premises hereunder, then the said lessee shall deliver to lessor as royalty, free of expense:
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> One-eighth (1/8) of all oil produced and saved, including distillate or other liquid hydrocarbons, delivery of said oil to be understood as made when same has been received by the first purchaser thereof. Or lessee may, in lieu of said oil delivery, and at its option, pay to lessor sums equal to the value thereof on the premises; provided no deductions or charges shall be made for gathering or transporting said oil to the purchaser thereof, or loading terminal, nor shall any deductions whatsoever be made chargeable to lessor; * * *.
>
> One-eighth (1/8) of all gas produced and saved or utilized, delivery of said gas to be understood as made when same has been received by the first purchaser thereof. Or lessee may in lieu of said gas delivery, and at its option, pay to lessor sums equal to the value thereof at the well, provided no gathering or other charges are made chargeable to lessor; provided further that the price paid lessor for said gas shall not be less than the average price then current for gas of like character or quality delivered to the pipe line purchaser in that field.

(Emphasis added.)

Appellants recognize that this Board has previously held in Exxon Company, U.S.A., supra, and OXY USA Inc., supra, that gas transportation costs under the 1942 Louisiana State lease form are not deductible. They argue that when all of the relevant facts are considered, however, the only conclusion that can be reached is that the State has consistently allowed deduction of gas transportation charges under the 1942 lease form and that MMS must defer to that interpretation. (SSOR at 15-20.) Although Appellants contend otherwise, we are here presented with virtually the same

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9/ The district court's conclusion was stated in its Dec. 1, 1994, Ruling, more fully described in n.3, ante.

10/ The record contains copies of three leases, one of which was submitted merely as a representative example. (Appellants' Response to MMS' Answer at 4, n.1.) Although it is not clear that the other two are the leases under which Appellants actually operate, it is apparent that they are issued on the 1942 State lease form.

arguments and evidence we considered in Exxon and OXY. We therefore must decide whether we agree with Appellants' assertions that those cases were based on incomplete records (SSOR at 15-16) and thus wrongly decided (SSOR at 16-18), such that the Board should reconsider and reverse those rulings.

Appellants contend that the State has not consistently disallowed gas transportation costs under the 1942 form, arguing that the State in fact has consistently allowed gas transportation costs to be deducted under the 1942 form. (SSOR at 16, 18-20.) In support of this view, they have submitted a copy of the September 8, 1966, Resolution adopted by the Louisiana State Mineral Board (LSMB). 11/ (Ex. B to SSOR.) The 1966 Resolution approved guidelines for calculating royalties due under various state lease forms, including the 1942 form. Appellants argue that the guidelines in this Resolution recognized the deductibility of gas transportation costs in certain circumstances for production from leases subject to the 1942 lease form. (SSOR at 8.) In particular, Appellants refer to section 4.7 of the guidelines, titled Transmission costs, which states that transmission costs "may be allowed if the facts of any particular case * * * disclose that such costs are extraordinary in nature and are necessary to obtain a market for the production in question." (Ex. B to SSOR, sec. 4.7.)

We considered the 1966 lease form in Exxon Company, U.S.A., supra, and we considered the article by Assistant Louisiana Attorney General James E. Phillips, Jr., titled The 1966 State Lease Form, 14 Mineral Law Institute 3 (1967), which discussed the changes in the 1966 lease form, as compared to the 1962 form. In that appeal, Exxon argued that in amending the 1966 lease form to permit the deduction of the costs of compressing gas at a point in or adjacent to the field from which it was produced, and by providing that transportation costs for gas were to be treated the same as those for oil, the LSMB determined that transportation costs were to be allowed. We rejected Exxon's contentions and concluded:

> The adoption of a new form in 1966 containing substantially different language than that contained in the 1942 lease form cannot be presumed to have superseded the plain, contrary terms of the 1942 form. [Citation omitted.] While LSMB might have resolved a troublesome question [whether the costs of compressing gas were deductible] by amending the 1966 form, there is no indication that it did so in a way which retroactively altered the terms of the 1942 form, which presented no ambiguity. [Footnote

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11/ The LSMB is the entity responsible for drafting lease terms, ensuring compliance with such terms, determining various matters relating to land, and for administering those leases on its behalf. 30 La. Rev. Stat. Ann. §§ 129(a) and 131 (West Supp. 1999). As we noted in Exxon Company, U.S.A., supra at 34, it has reviewed and approved all bonuses, rentals, and royalties due under State leases.

> omitted.] Appellant has not alluded to any leases issued on the 1942 form where the State remains as lessor and where transportation deductions have been allowed.

Exxon Company, U.S.A., supra at 35-36 (citation omitted).

We do not share the view of section 4.7 urged by Appellants. In our opinion, it states an exception to the rule, which is that transportation deductions generally are not allowed. As section 4.7 of the 1966 guidelines clearly states, to obtain an allowance for transportation costs, a lessee in a particular case must demonstrate to the LSMB that such costs are (1) extraordinary and (2) were necessary to obtain a market for the production. It thus appears that ordinary transportation costs would not be deductible in any event. Assuming a lessee alleges extraordinary costs, it then must be shown that such costs were necessitated by the lack of a market in or near the field, because whether a deduction is to be allowed apparently is to be decided on a case-by-case basis. Accordingly, we agree with MMS that the 1966 Resolution does not show that the State has consistently granted transportation costs under the 1942 lease form.

Appellants also have submitted a January 6, 1992, letter to Exxon Company, U.S.A. from Sandra Bailey (Bailey letter), the Acting Director of the Office of Mineral Income of the LSMB, which was before us in OXY. (Ex. C to SSOR.) That letter stated that reasonable transportation charges are deductible, and specifically, that "[t]ransportation is allowable from the field boundary to a point of delivery outside the field." In OXY, we observed that the letter did not appear to be an official decision of the LSMB, and noted that even if it could be termed such, it would constitute a reversal of position that would diminish the deference we otherwise would accord decisions of the LSMB. (October 19, 1992, Order in OXY USA, Inc., at 4.) Appellants would overcome our reservation by pointing to interrogatories propounded to the State in Texaco, Inc. v. Louisiana Land & Exploration Co., (Texaco, Inc.) C.A. No. 88-998 (M.D. La.). In particular, Appellants have provided the following excerpt from Bailey's response to Interrogatory No. 4(a), wherein it was stated that

> Louisiana courts * * * have interpreted similar language [to the 1942 lease form] to mean that, while a lessee may not deduct ordinary production and other expenses, he may, when transporting gas to a market outside the field, deduct a reasonable sum for transportation from the field to an appropriate delivery point outside the field, as well as the reasonable cost of compression to overcome line pressure in a purchaser's pipeline. In light of the applicable jurisprudence, the State allows reasonable transportation and compression charges, to the extent required by the jurisprudence and substantiated by the lessees, for all gas extracted under leases using the 1942 Form.

(SSOR at 9, Ex. D to SSOR at 18 - 19 (footnote omitted).)

Appellants argue that the Bailey letter is an authoritative articulation of the State's position, and that this is established by the State's interrogatory answers as verified by Bailey in her capacity as an agent for the State. (SSOR at 11-19.) Appellants thus submit that the 1966 Resolution, the January 1992 Bailey letter to Exxon, and the State's answers to interrogatories, taken together, show that the State consistently has recognized the deductibility of gas transportation costs under the 1942 lease form. (SSOR at 19.) With respect to the discovery in the Texaco litigation, we note that Bailey was asked to state the interpretation of several lease terms, including "free of expense" and "value at the well." We believe it would be helpful to set out Bailey's answer more fully: 12/

> 4(a) The leases identified in subpart (a) of Interrogatory No. 4 are leases on the 1942 Form. The language "free of expense" appears in that form in the general royalty clause applicable to "* * * oil, gas and/or other liquid hydrocarbon mineral to be produced in paying quantities on the premises." This response is limited solely to the application and interpretation of the quoted language to natural gas. * * *
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> The gas royalty clause in the 1942 Form further provides that a lessee may pay "sums equal to the value thereof at the well . . . provided no gathering or other charges are made chargeable to the lessor[.]" Taken together, these two clauses C "free of expense" and "sums . . . [equal to the value thereof at the well, provided no gathering or other charges are made] chargeable to the lessor" C mean that a lessee may not deduct from royalties any costs whatsoever. Louisiana courts, however, have interpreted similar language to mean that, while a lessee may not deduct ordinary production and other expenses, he may, when transporting gas to a market outside the field, deduct a reasonable sum for transportation from the field to an appropriate delivery point outside the field, as well as the reasonable cost of compression * * *.

(Ex. D to SSOR (emphasis added).)

Bailey's response puts to rest at least one of Appellants' contentions in these appeals, and that is the question of what the State intended and meant by the language discussed. As to whether Bailey's response also

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12/ We note that the State's answers expressly were made subject to general objections as well as those stated within the answer, but that those general objections were not provided, characterized or summarized by Appellants. We are, of course, well aware of the skill and care with which discovery requests and responses are crafted, and we are not unmindful that in the course of litigation an answer may be shown to have a significant context, dimension or nuance not evident from the written response itself.

establishes the State's consistent interpretation of the 1942 lease form so as to allow deduction of transportation costs, however, we conclude that it does not. On the contrary, accepting Bailey's discovery response at face value, it establishes that, at some point in time not identified by Bailey or Appellants, the Office of Mineral Resources began to yield to local decisional law which interpreted phrases that were "similar" to "free of expense" and royalty "sums equal to the value thereof at the well, provided no gathering or other charges are made chargeable to the lessor" to allow a deduction for transportation costs, notwithstanding the meaning and result the State intended to achieve by the quoted contract terms. We do not know when the case law to which Bailey alludes developed, and we do not know whether and to what extent the interpretation imposed by State courts may have been applied in individual cases, but she certainly did not aver that the State never had prohibited transportation deductions under the 1942 lease form. In that regard, we note that the cases cited by Appellants concern private parties and private lease contracts, and they have not provided any data or other cases or an official pronouncement that specifically and directly describes the manner in which the State has actually responded to State court decisions.

That the State intended that no transportation deduction was to be allowed under the 1942 lease form is further evidenced by Resolutions issued by the LSMB on July 16, 1959, and May 13, 1965, which we discussed in Exxon Company, U.S.A., supra. Appellants assert that the Board erroneously relied upon the two LSMB Resolutions, because neither is relevant. (SSOR at 19.) While Appellants acknowledge that the 1959 Resolution plainly stated that no deductions were allowable under the 1942 lease (SSOR at 17), they contend that the LSMB never enforced the 1959 Resolution, and that the lack of enforcement is confirmed by the Phillips Paper, in which it was stated that "[n]o affirmative action was taken by the board to enforce its [July 16, 1959,] resolution." (SSOR at 17; Ex. F to SSOR at 7.) Accepting Phillips' statement at face value, we decline to place official inaction on the same footing as a duly issued declaration of the official view and policy of the LSMB. Cf. David A. Gitlitz, 95 IBLA 221, 224 (1987), compare with 43 C.F.R. § 1810.3(a) and (b). As we have observed, as an evidentiary matter, Appellants have not provided any cases, data or affidavits from individual lessees or State officials showing that lessees under the 1942 form actually were allowed transportation deductions on a consistent and routine basis at any time. Accordingly, we find little merit to this argument.

Appellants deal with the 1965 Resolution by noting that by its terms it was limited to the valuation of oil for royalty purposes, specifically providing that transportation costs were not deductible for oil, whereas there is no such specific prohibition against gas transportation costs. (SSOR at 10-12.) According to Appellants, the proper context for the 1965 Resolution is the fact that the oil royalty clause of the 1942 lease form expressly prohibited transportation deductions, whereas the gas royalty clause did not. (SSOR at 17-18.) Since the Resolution did not pertain to gas, Appellants argue, the Board was wrong to rely on the May 1965 Resolution in deciding Exxon Company, U.S.A., supra, in which we considered and

rejected a component of this argument, declining to speculate why the 1942 gas royalty clause does not mirror the oil royalty clause:

> One could entertain a number of speculations as to why the drafters of the gas royalty clause in the 1942 lease did not include reference to "transportation." We are not aware that this omission has been the subject of judicial or administrative opinion at the State level. Without proof that the intent behind the language in this clause was to allow deductions for transportation costs, surmises concerning the significance of this omission remain purely speculative and do not persuade us to ignore the plain meaning of the 1942 lease terms.

Exxon Company, U.S.A., supra at 36.

It is not clear whether Appellants intend to suggest that the 1965 Resolution's prohibition against allowing transportation deductions in computing oil royalties is proof that the prohibition stated in the oil royalty clause of the 1942 lease was intended to be limited only to oil. (SSOR at 17-18, 25-26.) However, to the extent Appellants do intend to advance such a nuance for the 1965 Resolution and the 1942 lease form, we find no objective basis for accepting the suggestion as anything more than speculation. Moreover, the argument is undermined by the fact that the 1965 Resolution clearly recites that the 1959 Resolution pertained to oil and gas. We were not persuaded in Exxon Company, U.S.A. and we are not persuaded now that the failure to draft identical oil and gas royalty clauses should negate the sense and purpose of the lease form considered as a whole, the 1959 Resolution, or the acknowledgment within the 1965 Resolution that the 1959 Resolution "prohibit[ed] the deduction of charges of any kind from royalties on oil and gas delivered to the State [emphasis added.]"

Appellants further submit that the Board recognized in Exxon Company, U.S.A. and OXY USA, Inc. that the Department of the Interior should defer to the State's own interpretation of its lease form so long as that interpretation has been consistent. (SSOR at 15.) Because they maintain that the State has consistently allowed the deduction of gas transportation costs, Appellants assert that there is no need to independently analyze the lease language. They argue that even if analysis is necessary, they should prevail. Appellants assert that the gas royalty clause expressly provides that gas royalties are owed on the value of the gas produced "at the well" and that at the time the 1942 lease form was drafted, Louisiana case law permitted lessees to deduct transportation costs from their royalty payments as a post-production cost. (SSOR at 21-22, 25.) Freeland v. Sun Oil Co., 277 F.2d 154 (5th Cir.), cert. denied, 364 U.S. 826 (1960); Sartor v. United Gas Public Service Co., 84 F.2d 436 (5th Cir. 1936); Merritt v. Southwestern Electric Power Co., 499 So.2d 210 (La. App. 2nd Cir. 1986); Sartor v. United Carbon Co., 163 So. 103 (La. 1935); and Wall v. United Gas Public Service Co., 152 So. 561 (La. 1934), are cited in support. However, these cases all concern private parties and leases. MMS articulates

a different construction of the term, one that is more harmonious with the lease as a whole and with subsequent official pronouncements about the 1942 lease form:

> [W]hen gas is actually delivered to the lessor to satisfy the royalty obligation, royalty is due on all gas "produced and saved or utilized." This clause further states that in lieu of delivery, when royalty is paid in value, it must be paid on the "value thereof." The term "value thereof" refers back to all gas produced and saved or utilized, which must be delivered to lessor "free of expense." It follows that to reflect value, the royalty payment must also be free of expense.

(Answer at 5.) Thus, as the Board has said previously, the 1942 lease form represents an instance in which the parties elected to provide for a royalty obligation different from a standard "market value" lease by which royalty basis is computed at the well without the "added value" of transportation costs. Exxon Company, U.S.A., supra at 36-37. Accord Merritt v. Southwestern Electric Power Co., supra at 214; Sartor v. United Carbon Co., supra at 105.

Appellants also challenge this Board's interpretation of the gas royalty clause language that states that no "gathering or other charges" should be charged to the lessor. They contend that Louisiana authorities have made it clear that the term "gathering" is limited to activities in the field at or near the well, and does not include the cost of transportation of production away from the field to a distant point of sale. (SSOR at 22-25.) Wegman v. Central Transmission, Inc., 499 So. 2nd 436 (La. App. 2nd Cir. 1986), and Sartor v. United Carbon Co., supra, 13/ are cited as authority for the proposition that "gathering" refers only to well head and in-field movement of production (SSOR at 23), to which we in general have no objection. See Kerr-McGee Corp., 147 IBLA 277 (1999). To explain the disjunctive phrase "or other charges," however, Appellants invoke a principle of construction, ejusdem generis, to maintain that because the scope of the term "gathering" is limited to well head and in-field activities, the subsequent language "or other charges" must be similarly limited. Citing Huie Hodge Lumber Co. v. Railroad Lands Co., 91 So. 676, 677 (La. 1922), they assert that Louisiana case law as it existed when the 1942 lease form was drafted would have construed the phrase "or other charges" as limited to charges "of a character similar to" charges encompassed by the more specific term "gathering." (SSOR at 23-25.) In that case, the disputed clause was a reservation of the right to "iron, coal, and other minerals," the issue being whether "and other minerals" included oil and gas rights or only "solids or minerals in place, requiring mining for their removal instead of drilling." Huie Hodge Lumber Co., supra at 677.

13/ Appellants inadvertently combined the caption to, and citation of, Sartor v. United Gas Public Service Co., supra, and Sartor v. United Carbon Co., supra. We assume the intended citation was to the latter case.

Applying the rule of ejusdem generis, Appellants contend "or other charges" would include in-field metering and separation costs, for example, but would not include costs incurred to move production beyond the field because those charges are not "of a character similar to" gathering. (SSOR at 24-25.) We think the better analysis of the proper application of ejusdem generis is presented by MMS in its Answer at 8-11, and we concur with the additional authorities there cited to the effect that the whole contract is to be considered when discerning the meaning of its parts to determine the intent of the parties thereto. Moreover, ejusdem generis is not a substantive rule of law, and it cannot negate an intention that is clear, Phillips v. Houston National Bank, Houston, Tex., 108 F.2d 934, 936 (5th Cir. 1940), nor is it to be applied to the exclusion of other rules of construction or to defeat the purpose of the contract as illuminated by the contract when considered as a whole. Wellmore Coal Corp. v. Patrick Petroleum Corp., 808 F. Supp. 529, 535-36 (W.D. Va. 1992).

Appellants nonetheless argue that their interpretation is buttressed by the reference to the "value at the well" as the basis for computing the minimum royalty. It is contended that "value at the well" is modified by the subsequent requirement that the price for gas shall not be less than prices paid in comparable sales in the field. (SSOR at 25.) Appellants conclude that this language "represents an attempt by the State to clarify that transportation deductions would be limited to deductions for those costs incurred in moving gas outside of the field. If the State had intended otherwise, it hardly would have defined the 'minimum value' according to the in-field price." (SSOR at 25.) We see no reason to assume or speculate that the language means any more or less than what is plainly conveyed by the words themselves C that is, that the lease term merely establishes the floor below which the value of gas for purposes of calculating royalty may not fall.

Appellants next argue that theirs is the interpretation of the party which drafted the lease, i.e., the State, and insist that it is the intent of the contracting parties that should be dispositive. (SSOR at 26.) In support of this claim, Appellants again raise the September 8, 1966, LSMB Resolution, which differentiated between nondeductible "field gathering costs" and deductible "transmission costs," and note that the January 1992 Bailey letter to Exxon similarly draws a distinction between the two types of charges. (SSOR at 26.) They again point to the absence of an express prohibition against transportation deductions in the gas royalty clause as proof that none was intended. (SSOR at 26.) Believing they have thus demonstrated that the State interprets the 1942 lease form as prohibiting only deductions for in-field costs, Appellants insist that MMS cannot impose a contrary interpretation. (SSOR at 27.)

We think that this claim is well beyond what Appellants' evidence shows, for the reasons stated in addressing each document and argument. Appellants have argued with some tenacity that deductions for transportation costs are permitted under the 1942 lease, and that such deductions have been allowed for three reasons: the lease terms provide for it,

official State pronouncements confirm their interpretation of the lease, and other lessees under other leases are allowed to do so. Viewed in the light most favorable to Appellants' position, however, their arguments cannot be sustained on the record presented. We previously held that the lease terms, considering the lease as a whole, do not permit the claimed deduction, and we adhere to the opinions expressed in Exxon Company, U.S.A., supra, and OXY USA Inc., supra. Our opinion is borne out by the plain language of the LSMB Resolutions, which acknowledges that the State's official interpretation of the lease terms, at least until 1966, was that transportation deductions were not allowed under any circumstances. As we have said, we see no reason to equate lack of enforcement with the official action of a body charged with administering mineral leases on behalf of the State. Even if Louisiana state court decisions have required the LSMB to allow transportation deductions, it strains reason to insist that this development is not a reversal of the position previously expressed in formal pronouncements in the LSMB Resolutions, and it requires us to take a somewhat shallow view of the evidence as a whole.

Appellants' final contention is that lessees operating under section 8 leases and section 6 leases executed on state lease forms other than the 1942 form are permitted to deduct transportation costs. It is argued that MMS' interpretation contravenes the legislative intent underlying section 6 of the OCSLA by placing lessees in a different economic position than they would have enjoyed had validation not occurred, and that the interpretation is arbitrary and capricious and an abuse of discretion. (SSOR at 15, 29.) We must reject this argument as well. That other lessees may be bound by other or different lease terms furnishes no basis for concluding that MMS has acted arbitrarily and capriciously, or abused its discretion in interpreting the lease form to which Appellants are parties. The economic position to be preserved under the OCSLA is that which existed on August 7, 1953. Ocean Drilling & Exploration Co. v. United States, 600 F.2d 1343, 1347 (Ct. Cl. 1979). On that date, lessees under the 1942 lease form were not allowed to deduct transportation costs. We therefore find that MMS' interpretation of the lease is in accord with the legislative intent of the OCSLA.

Appellants have filed a reply brief which reiterates the arguments advanced in the SSOR and discussed above. To the extent not specifically addressed, other arguments have been considered and rejected.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decisions appealed from are affirmed.

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T. Britt Price
Administrative Judge

I concur:

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Will A. Irwin
Administrative Judge